successively, or as tenants-in-common with cross-remainders, the remainders to the children are clearly bad by the rule against remoteness. To avoid the effect of this rule the limitations are construed as an estate tail in the unborn person.[2] This doctrine has not been confined to a succession of estates tail, however, but has been extended to successive life estates. Under a devise to an unborn person, remainder to his children for life as tenants-in-common, so to be continued in a descending line *per stirpes* for life with cross-remainders, the unborn person has been given an estate tail.[3] In a recent case the limitations were substantially these with the exception that no cross-remainders were limited, and none could be implied, since there was no devise over.[4] *In re Richardson*, [1904] 1 Ch. 332. The reasoning of the court in holding that the *Cy-pres* doctrine does not apply, and that the estates subsequent to those of the unborn person are bad because of the rule against remoteness, suggests an inquiry into the principles underlying this rule of construction.

The application of the *Cy-pres* doctrine to these cases is said to be justifiable, for thereby, provided no holder bars his tail, the estate will go as it would have gone under the testator's limitations. This, however, does not account for the application of the doctrine to limitations of life estates. In such cases, under the testator's limitations, all children of the unborn person would have taken life estates at the same time, while after the application of the *cy-pres* construction, the younger children have merely a possibility on failure of issue of the older children. The courts say that there should be a sacrifice of the testator's special intent, as regards the order of taking, to his general intent in regard to the persons who shall take.[5] No greater sacrifice is made, for, as a recent case shows, the rule is applied only where the exact persons are included who would have been included in the testator's limitations.[6] *In re Rising*, [1904] 1 Ch. 533. In addition the rule has been applied only where there were cross-remainders, express or implied, under the testator's limitations. In such cases each person had the possibility, if the other lines failed, of getting in the whole estate, and of passing it to his children. This was practically equivalent to the estate tail which he will get under the new construction. Though the order of taking is entirely departed from, yet the general scheme of the testator is preserved. The court in the Richardson case, however, clearly indicates that it regards the doctrine as applicable only when the life tenants would have taken in the same order under the testator's limitations, in which they will take under the estate tail. It would be altogether reasonable to thus confine the doctrine to cases in which the intention of the testator will be almost exactly accomplished. Its application to cases where the order of taking will be entirely changed seems, however, well established by the cases noted. The principal case, nevertheless, though distinguishable, since there were no cross-remainders, indicates a commendable tendency to confine the doctrine within its present limits.

PAROL EVIDENCE OF WRITINGS COLLATERAL TO THE ISSUE. — The general rule that parol evidence of the contents of a document is not admissible unless for some good reason the document itself cannot be produced,

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[2] Vanderplank *v.* King, 3 Hare 1.
[3] Parfitt *v.* Hember, L. R. 4 Eq. 443.
[4] 2 Jarman Wills, 6th ed., 1339.
[5] Jessel, M. R., in Hampton *v.* Holman, 5 Ch. D. 183, 190.
[6] Monypenny *v.* Deering, 2 DeG. M. & G. 143; Seaward *v.* Willcock, 5 East 198.

has two principal applications: (1) As applied to contracts and other solemn instruments drawn up by the parties to the suit, it appears to be a rule of law.[1] This is based on the fact that the parties having committed themselves to writing, any parol evidence concerning the transaction is immaterial and irrelevant. (2) As applied to writings generally, it is a rule of evidence, the basis being that a document is the best evidence of its contents and must therefore be produced if possible. It is often said, however, that this latter rule should not be enforced when the document does not constitute the gravamen of the action, and is therefore collateral to the issue.[2] Although such an exception has found much favor in the language of the courts, an examination of the cases shows that they could for the most part have been decided on other grounds.[3] They seem to fall into three classes: In the first class what is sought to be proved is really not the contents of the document, but some fact or status which the existence of the writing establishes. Thus oral testimony of written orders is admissible to show that the plaintiff was in the employ of the defendant;[4] and so of an insurance policy to show that the defendant was insured.[5] In the second class of cases the fact to be proved can be perfectly well established without the paper. The paper would indeed be evidence, but it does not follow that all other evidence should be excluded. A common instance of this occurs when a defendant is allowed to put in evidence of payment without producing or accounting for the receipt.[6] These cases cannot be regarded as exceptions to the general rule, for in the first class the contents of the paper are not involved and in the second the circumstances are such that the paper cannot be regarded as the best evidence.[7] The third class of cases cannot be explained on the ground that the rule is inapplicable, for in them the document is the best evidence, and its contents are involved. They may accordingly be considered as the only authority for the exception supposed to be based on the collateral nature of the document.[8] A case recently decided in the New York Court of Appeals raises the question as to the validity of an exception on this ground. A, in a suit for work done under a contract with B, was not allowed to put in oral testimony as to the contents of a written contract made by B with C, a third party, in order to show that the work for which payment was claimed was not covered by that contract. *Taft* v. *Little*, 178 N. Y. 127. If the exception is to be logically followed out, it would seem that the case must be wrong, for the contract, evidence of which was excluded, was not the foundation of the plaintiff's claim, but collateral thereto. Yet the decision is clearly in accord both with reason and authority.[9] It seems clear therefore that nothing can turn on the fact that the document is collateral. But while the theory commonly advanced seems inadequate, it is difficult to frame any comprehensive rule to take its place, and the justice of each decision on its facts leads to the conclusion that the question may be largely left to the discretion of the courts. Perhaps as a rough test it might be said that where the facts desired to be

[1] See 17 HARV. L. REV. 271.
[2] Sommer *v.* Oppenheim, 19 N. Y. Misc. 605.
[3] 1 Greenl. Ev., 16th ed., § 563 m.
[4] Engel *v.* Eastern Brewing Co., 19 N. Y. Misc. 632.
[5] People *v.* Goldsworthy, 130 Cal. 600.
[6] Berry *v.* Berry, 17 N. J. Law 440.
[7] Greenl. Ev., *supra*.
[8] Foster *v.* Cleveland, etc., Ry. Co., 56 Fed. Rep. 434.
[9] Vincent *v.* Cole, Moo. & M. 257; Buxton *v.* Cornish, 12 M. & W. 426.

proved can easily be established without the document, its production may be dispensed with. Where, on the other hand, proof without the document would be difficult and unsatisfactory, the court will require it in evidence.

THE DEFENSE OF COMMON EMPLOYMENT. — The rule that a servant cannot recover damages from his master for injuries received through the negligence of a fellow servant has usually been supported on the theory of assumption of risk. A servant is regarded as impliedly contracting to assume all the ordinary risks incident to his employment, and the chance of injury from his fellow servants is said to be one of these risks.[1] A recent Georgia case in holding that it was error to enter a non-suit on the ground that the injury done to the plaintiff, a minor, was caused by the negligence of a fellow servant, suggests that the general doctrine should not apply where the injured party is of such a tender age that he cannot be presumed to have understood or assumed this risk. *Evans* v. *Josephine Mills*, 46 S. E. Rep. 674.

If the defense of common employment is in fact based on the doctrine of assumption of risk, the limitation upon that defense which the court suggests, seems to follow of necessity, since it is well established law that a minor cannot be held to assume dangers which his undeveloped faculties are unable to perceive.[2] There is, moreover, some authority in accord with this view.[3] At least an equal number of decisions, however, reach a contrary result, on the ground that the fellow-servant rule is to be applied alike to adult and minor.[4] And in many cases where the express point is not decided the language of the court leads inevitably to the same conclusion.[5] When authority is in such conflict, it may be of service to examine the grounds on which the general doctrine is founded.

By the doctrine of *respondeat superior* the master is unquestionably liable for an injury to a third party occasioned by the negligence of one of his servants. Why that doctrine should not equally apply when the injured party happens to be another servant of the same master is by no means clear. Nor can it be wholly explained by saying that the servant assumes the risk, for why should he be regarded as assuming the risk of the negligence of another servant any more than the negligence of his master?[6] Confronted with these difficulties, many judges have admitted the impossibility of finding a satisfactory explanation of the rule, and have regarded it as an exception to the theory of *respondeat superior* arising from the necessity of the case,[7] and sanctioned by public policy.[8] Perhaps the obvious helplessness of the master in preventing such injuries among his servants, and the consequent hardships of throwing on him the burden of being their insurer, influenced the courts in adopting the rule.

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[1] Farwell *v.* Boston & W. R. Co., 4 Met. (Mass.) 49; Bartonshill Coal Co. *v.* Reid, 3 Macq. H. L. Cas. 266.

[2] Kehler *v.* Schwenk, 151 Pa. St. 505.

[3] Hinkley *v.* Horazdowsky, 133 Ill. 359.

[4] Craven *v.* Smith, 89 Wis. 119.

[5] Fiske *v.* Central Pacific R. Co., 72 Cal. 38; King *v.* Boston & W. R. Co., 9 Cush. (Mass.) 112.

[6] See dissenting opinion in Crispin *v.* Babbitt, 81 N. Y. 516.

[7] Crispin *v.* Babbitt, *supra*.

[8] Rogers *v.* Ludlow M'f'g Co., 144 Mass. 198; Louisville & M. R. Co. *v.* Lahr, 66 Tenn. 335.